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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 324

PUBLISHERS' ASSOCIATION OF NEW YORK CITY
(on behalf of its member, The New York Times Company),
Petitioner,

against

NEW YORK MAILERS' UNION NUMBER SIX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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NEW YORK MAILERS' UNION NUMBER SIX,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 48-54) is reported at 317 F. 2d 624. The opinion of the United States District Court for the Southern District of New York (R. 3-4) is only unofficially reported, at 52 LRRM 2101 and at 46 LC Par. 17,968.

Jurisdiction

The judgment of the Court of Appeals (R. 55) was filed May 20, 1963, reversing in part the order of the District Court (R. 2-3) entered November 20, 1962. The

petition herein for a writ of certiorari was filed August 17, 1963, and was granted (R. 5-6) on November 12, 1963, 375 U. S. 901.

Statutes Involved

The statutes involved and appended hereto are, in relevant parts, Norris-LaGuardia Anti-Injunction Act (47 Stat. 70, 29 USC 101), Sections 1-4, 7, 9, and 13; Labor Management Relations Act, 1947, as Amended, popularly known as "Taft-Hartley" (61 Stat. 136, 29 USC 141), Sections 7, 8(a)(1) and (2), 8(b)(1), 14(a), and 301(a); Labor-Management Reporting and Disclosure Act of 1959, popularly known as "Landrum-Griffin" (73 Stat. 522, 29 USC 411), Sections 101(a) and (b); and United States Arbitration Act (61 Stat. 669, 9 USC 1), Section 3.

Questions Presented

1. Whether or not[1] the conduct of internal union proceedings, pursuant to constitution and by-laws, investigating one member's charge against another looking toward the latter's possible discipline by the union, falls within the scope of Norris-LaGuardia Sec. 4(b) acts not to be prohibited in a labor dispute between the union and the employer of those members concerning such proceedings;

2. Whether or not, in a labor dispute within the meaning of Norris-LaGuardia Sec. 13, the District Court, upon

1. This vital jurisdictional question, marked for reservation here in the footnote on p. 2 of respondent's Brief opposing certiorari, was pointedly presented and rejected in the courts below. The question of jurisdiction is ever alive. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588. Also see article by Judge Yankwich, Jurisdiction of Federal District Courts, 6 F.R.D. 507.

the employer's complaint, may enjoin the aforementioned union conduct without complying with the procedural requirements of Sec. 7 thereof.

[N.B. Petitioner's formulation begs the question as litigated below. Its premise that "the stay is based upon a 'status quo' provision" etc. is unsupported by any such Court findings, conclusions, or other stated reasons whatever for the injunction. The District Court reasoned and held no more than that the dispute was arbitrable (R. 25). Nonetheless, if petitioner's hypothesis is accepted by this Court, query whether a commitment to maintain *status quo ante* pending arbitration of a disputed change has any different legal significance in this context than an express no-strike promise.]

Counter-Statement of the Case

The Facts

Summarily, the material facts pleaded and shown without critical contest are as follows. The parties' collective agreement (R. 6-8, 11) requires the employer's foreman to be a member of the union, but provides that the union shall not discipline him, as a member, for carrying out employer's instructions. Moreover, subtended to express no-strike assurances, the agreement commits all disputes, broadly described but with stated exceptions, to ultimate determination by arbitration, pending which the *status quo ante* is to be maintained.[2] Among the relevant excep-

2. Petitioner's argumentative footnote 2 at p. 4 of its Brief proves too much and concedes too little. Its "vulnerability" to "unwarranted union demands" and "work stoppages", because "its product is extremely perishable" (cf. *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254), is fortified against, if at all, rather by the union's independent and unconditional no-strike commitment, to which the

tions are "the creation or operation of any rules not in conflict with * * * this contract, of any chapel or of the Union * * * for the conduct of its or their own affairs"; "local union laws not affecting * * * working conditions and the General Laws of the International Typographical Union"; and "the fundamental rights reserved by and to both parties".

On August 20, 1962, one Kelly, a union member, duly filed with it a written sworn charge (R. 12-13) against one Rowan, a fellow-member and a foreman, accusing the latter of violating a specified provision of the union's constitution by reason of alleged facts surrounding Rowan's one-week suspension of Kelly from his job. In accordance with union's prescribed mandatory procedure (R. 27-35), copy of the charge was duly served August 21 on Rowan (R. 14); on August 24 the latter filed an answer to the charge on its merits (R. 47); the union membership body on September 9, 1962, after debate, voted that the charge was "cognizable", i.e., stated a case on its face; whereupon an investigating committee was appointed to consider and report to the union membership whether or not there was *prima facie* proof of Rowan's violation as charged, sufficient to warrant a trial on the merits (R. 37-38); and the committee thereupon duly summoned Rowan to a hearing for said limited purposes of inquiry on September 24, 1962 (R. 15).

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arbitration-*status quo* mechanism is explicitly stated to be the effective implementation. The contract, in full text before the District Court but excerpted for the record here, thus reads as follows, in the third literary paragraph of Sec. 24:

> "It is the intention and the desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein."

In the meantime, on August 31, employer had submitted a grievance in writing (R. 16) protesting against union's "notification * * * to * * * Rowan * * * of the charges filed against him". Calling attention to the contract's prohibition of union discipline against a foreman-member, and asserting that the charge "relate(d) to the execution of Mr. Rowan's supervisory duties", employer claimed a contract violation in the mere notice of charge and demanded its retraction, on pain of pressing the grievance to arbitration; and meanwhile "that no further action be taken by the Union to hear charges against, or to discipline this foreman."

In response, on September 13 union rejected employer's "purported grievance" and demands as "presumptuous and premature"; asserted that the union proceedings as such on Kelly's charge were of "no legitimate concern" under the contract, and that "(u)ntil and unless the Union * * * resolves the matter on its merits as between its members Kelly and Rowan so as to visit discipline upon the latter", the grievance must be treated as "officious intermeddling" in the Union's internal affairs (R. 17-18).

District Court Proceedings

Employer's action was commenced on September 24, 1962, by service of summons and complaint (R. 5-18), together with an order to show cause containing a restraining order (R. 18-19). As required by the terms thereof, the employer posted security routinely under F.R.C.P. Rule 65(c). The union's duly constituted investigating committee was thus enjoined from proceeding to investigate Kelly's charge against Rowan to enable it to report whether or not there is warrant to order a

trial, before another union body, of the issue so drawn between those two members.

The complaint and moving papers purported to state a single cause of action for specific performance of the agreement to arbitrate, uncritically treating the injunctive restraint aspects of the prayer as but an ancillary stay of the very matter so referable to arbitration. The answer and opposition papers specifically and sharply raised the points brought to the Court of Appeals and now here under Norris-LaGuardia. Nevertheless, on submission of the case without a hearing, the District Court granted in full the relief sought in the complaint, on the sole dispositive authority[3] of *Macneish* v. *New York Typographical Union No. 6*, 205 F. Supp. 558 (S.D.N.Y.). It granted the "stay" without making any findings of fact or otherwise observing the procedures prescribed in Norris-La-Guardia Secs. 7 and 9, indeed without making any reference to that Act at all; moreover, without reference to or compliance with Rule 65(d), Federal Rules of Civil Procedure.

Court of Appeals Proceedings

On the union's appeal, the Court of Appeals affirmed the District Court decision to the extent that, under Taft-Hartley Sec. 301, it compelled arbitration of the employer-union dispute as to the alleged breach of their contract, but reversed it insofar as, despite Norris-LaGuardia, it

3. In *Macneish*, none whatever of the jurisdictional points relating to the injunction phase of our present case appear to have been raised, considered, passed upon, or decided there. The stay was granted therein *pro forma*, without findings or explication of any grounds on which it was based. Similarly, it does not appear that the District Court's simultaneous decision in the unrelated *Publishers'-Typographical Union* case referred to in its Opinion, and commented on in petitioner's Brief at f. 4 on p. 6, involved any question of jurisdiction to issue a prohibitory injunction.

enjoined the union's internal action in the Kelly-Rowan dispute. The reversal was grounded on Norris-LaGuardia Secs. 7 and 13 and this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195.

The Court of Appeals held it "quite clear that the union's action on the Kelly charges both involves and grows out of a labor dispute" (R. 50). Erroneously, we believe, it held the union "to have failed to establish that the activities which have been enjoined are included in any of the categories of (Norris-LaGuardia) Section 4" (R. 51-2). But it concluded: "However, Section 7 of the Act covers activities which are not covered by Section 4. • • • Section 7 applies to injunctions in *any* cases involving or growing out of a labor dispute and prohibits the issuance of injunctions in all such cases, without regard to the nature of the activities against which the injunction is sought, unless certain procedural requirements are met and unless the court issuing the injunction makes certain findings. Not only have these requirements not been met in the present case but it would clearly be impossible for the court to make the required findings" (R. 51-3).

The Court of Appeals had posited the basic proposition in its opinion: "Absent Section 301 of • • • (Taft-Hartley), there could hardly be any question that the power of the court to enjoin a violation of a collective agreement would be limited by the Norris-LaGuardia Act. If the Court has power to enjoin the alleged violation in the present case it has that power only by virtue of the power to compel arbitration which is conferred by Section 301" (R. 50).

The Court below acknowledged the distinction that in *Sinclair* this Court had dealt with breach-of-contract strikes (concerning arbitrable grievance issues) clearly

within Norris-LaGuardia Sec. 4 (R. 51). Nevertheless, on the strength of the *Sinclair* reasoning and even *a fortiori*, it further concluded that neither the legislative history of Taft-Hartley Sec. 301 nor "reason or policy" could support the "subtlety" of an assumed repeal of Norris-LaGuardia Sec. 7 (R. 53). It pointed up the contrary's anomalous result that, while an employer "could not enjoin a strike or other Section 4 activity in violation of a collective agreement pending arbitration of the violation, he could enjoin any other type of violation. Ordinarily a strike would be far more disruptive of the contract relationship, and far more inimical to the statutory ideal of peaceful solution through the arbitration process than would the type of violation with which we are dealing in the present case • • • of a much less serious character" (R. 54).

Present Status of the Parties' Dispute[4]

Moot and academic questions involved

At no time since November 20, 1962, fifteen months ago when the District Court ordered arbitration, and despite the Court of Appeals' affirmance thereof on May 20, 1963, nine months ago, has petitioner moved the dispute to hearing and determination by that expeditious process of final resolution. At all times since May 20, 1963, when freed by the Court of Appeals from the District Court's injunction, respondent, while urging petitioner without avail to proceed to arbitration, voluntarily refrained as a courtesy but did *not* agree to refrain, as requested, from proceeding with the disputed internal union action on the pending Kelly-Rowan charge.

4. We inform the Court of the facts and our views herein solely in the interest of judicial administration, and make no further point of them.

Moreover, as laid before this Court by separate pending Suggestion of Mootness, that charge has been withdrawn with prejudice and the union has dissolved the Investigating Committee and terminated all proceedings on the charge. Cf. this Court's holding of mootness "(i)nsofar as the grievances sought restoration of workloads and job assignments", followed by employer's termination of mill operations. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 459.

As we called to this Court's attention in respondent's Brief opposing certiorari, at pp. 3-4, "* * * petitioner's espousal of the cause of arbitration seems more academic than real". We questioned "its plea of right to injunctive relief 'ancillary' to an arbitration which inexplicably[5] it has stalled for almost one year", now fifteen months. We suggested, "The injunction would seem to be the end in itself to be desired, else it is doubtful that an actual, justiciable controversy exists at all."

Obviously, activation and conclusion of the arbitration, whatever its outcome, would similarly moot the case here. The issues brought here for determination on such borrowed time, and in face of the late resolution of the underlying dispute, could hardly be contrived to confront this Court with the onus of indulging in a more patent exercise of giving "opinions upon moot questions or abstract propositions, or of (declaring) principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U. S. 561; *Local No. 8-6, Oil, Chem. and Atom. Wkrs.* v. *Missouri*, 361 U. S. 363.

5. Unless, of course, petitioner should accept the dilemma of its having either (1) no actual interest in the substantive merits of the dispute to be arbitrated or (2) a fear of proceeding lest the "ancillary" stay issue be mooted.

Summary of Argument

I. The union acts complained of and prohibited[6] by the District Court injunction, being lawful, non-fraudulent, and peaceful self-regulatory proceedings mandated by union constitution and by-laws, in a controversy regularly and duly initiated thereunder by one of its members as against another, and involving and growing out of a labor dispute between and among employer, some of its employees, and union, were of a kind and character encompassed in Norris-LaGuardia Sec. 4(b) and, as such, were totally immune to reach by injunction at the employer's suit;

II. However the conduct may be categorized or descriptively generalized in Norris-LaGuardia Secs. 1-4, the union acts complained of, occurring as they did in a labor dispute, could not be prohibited by injunction, since this is a class of "case" comprehended in Sec. 7 thereof, and except in strict conformity with the prerequisites specified therein, irrespective of any otherwise actionable relief available under Taft-Hartley Sec. 301 as for breach of contract.

Counter-Argument: This *Is* a Labor Injunction

Not Merely Ancillary Stay Necessary to Effectuate Arbitration Order

Before developing these arguments at length, it would be well to address ourselves at once to petitioner's point

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6. Petitioner's main line of argument for a mandatory Sec. 301 decree commanding specific performance (à la *Lincoln Mills*) of the promise to maintain *status quo* rests on a false bottom of semantics, as if artfully to avoid the vice of a prohibitory injunction restraining change of status. We have not thought that *Sinclair* would have gone the other way if specific performance had been sought of an affirmative promise to work without interruption. Petitioner's posturing thesis seems to fancy such a devious judicial *tour de force*.

(III in its Brief) that somehow no labor injunction is involved at all in the "stay". In vindication of the Court's "inherent equity jurisdiction" to protect its own main order to arbitrate, petitioner would thus sweep Norris-LaGuardia under the carpet and out of sight. It cites and analyzes various cases and some legislative history to demonstrate the traditional distinction between injunctions and ancillary stays. In the main, we would not quarrel with the broad proposition or the leading supportive authorities cited that existing jurisdiction and orders in equity may be implemented with appropriate interlocutory, usually non-appealable directions, or with a denial of same, calculated incidentally to facilitate, regulate, and ensure the conduct of the principal proceedings and due execution of the ultimate mandates; or, in cases of "pendent jurisdiction", to avoid wasteful and burdensome relitigation of essentially the same issues.

As petitioner concedes (Brief, p. 18 second paragraph), indeed insists, the "request that the Union be compelled to arbitrate * * * was the principal relief sought". This Court held in *Goodall-Sanford* v. *United Textile Workers*, 353 U. S. 550, 551: "Arbitration is not merely a step in judicial enforcement of a claim or auxiliary to a main proceeding, but the full relief sought. A decree under Sec. 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' * * *." Petitioner has long had that ultimate relief in this case, done nothing about it, but thinks the integrity of the District Court's decree to that effect, backed as it was with a "stay" in advance aid of execution, as it were, must still be upheld purely as an exercise of self-assertive power, *nunc pro tunc* and for all its gathering signs of futility.

Apart from that, the precise matter ordered to arbitration was the subsumed breach of Sec. 20-c of the contract, the promise not to discipline foreman Rowan. The Court's jurisdiction was invoked and the case lay, however, not because of or for relief from *that* alleged breach, but rather exclusively because of and to relieve from the entirely separate, disputed breach of the Sec. 33 a-d agreement to arbitrate. As an ostensible incident to such latter relief, petitioner prevailed upon the District Court to implement the order of arbitration as such, not with directive assurances of unreluctant submission to and successful exhaustion of that agreed process,[7] but with an unvarnished negative, prohibitory injunction (R. 3) restraining the various acts subsidiarily disputed as violative and, contrariwise, non-violative of Sec. 20-c. And that implementation is now sought to be justified under the guise of a valid "request for enforcement of the status quo clause (as) an appeal to that inherent equity jurisdiction which operates to ensure that judicial orders will not be meaningless" (Pet. Br., pp. 18-19).

But the "status quo clause" itself, separately expressed in Sec. 34 of the contract, was thus too a promissory commitment the alleged and denied breach of which was exclusively arbitrable under Sec. 33 a-d, just as a disputed

7. E.g., effectuation by Court appointment of an arbitrator if the proceeding should be frustrated by failure of parties to make a mutual selection. *Deaton Truck Line* v. *Local 612 Teamsters*, 307 F. 2d 748, rehearing denied 314 F. 2d 418 (C.A. 6); *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D.C. Mass.). Of course, stay of a parallel damage action at law between the same parties for the same cause, which in effect the parties have foreclosed to themselves by prior stipulation upon the arbitration tribunal, is standard procedure. *Drake Bakeries*, supra; *Arbitration Act*, Sec. 3. And, similarly, *Old Dutch Farms*, cited and argued from in petitioner's Brief at pp. 22-4, stands for no more than judicial intervention to assure exhaustion of the arbitration proceeding already commenced.

strike in spite of Sec. 24 would be. *Drake Bakeries*, supra. The status quo clause is neither self-executing, nor excluded from the arbitration ambit, nor enforceable but by way of an arbitration award. *Armstrong-Norwalk Rubber Corp.* v. *Local 283, Rubber Workers*, 167 F. Supp. 817, 819-20 (DC Conn.), appeal dismissed 269 F. 2d 618 (C.A. 2); *Fuller Co.* v. *Steelworkers*, 220 F. Supp. 896 (DC, E Pa.).

The "stay" is a bare injunction verbally in its terms and coercively in intended effect, truly as "permanent" as the prime order to arbitrate is a "final decision". Contrary to petitioner's repeated misconceptions urged below and upon this Court, the situation does not involve evasion of the arbitral process, pursuit of inconsistent remedies, or preemption of forums on the same or a substantially or determinatively related issue as between the same parties. The conduct enjoined is at most a private, internal, self-governing union investigatory proceeding to which petitioner is not party, upon an immediate issue among and between the union and certain of its members as such, to which proceeding petitioner is stranger and by any determination of which it could not possibly be bound, prejudiced, or even benefited.

The only issue "finally" decided in *this* case, on the other hand, was whether the union must perform its contractual obligation to arbitrate the underlying dispute raised by the employer's protest that the union's said internal proceeding breaches the Sec. 20-c promise not to "discipline" a foreman-member. Saved for the arbitrator, come the day if ever, will be the wholly different, residual issue as to whether or not that latter promise was so breached.

The so-called "stay" is an independent, plenary imposition of intrusive restraint which, but for the wrappings

of the attendant arbitration, we would all recognize at once to be an injunction in its crudest sense. Even in a Sec. 301 action to *enforce* a contested arbitration award, the Courts frankly recognize that a preliminary order of compliance therewith, to abide decision on enforcement, is an "injunction", without stylized equivocation in terms of ancillary powers attaching to pending jurisdiction. *Local 453, IUE* v. *Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y.); cf. *idem*, 314 F. 2d 25 (C.A. 2).

The indications otherwise, stressed by petitioner (Br. 20-1), in *Brotherhood of L.E.* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528, are clearly distinguishable and not in point. That involved an authorized action under the Railway Labor Act *for an injunction prohibiting a strike* pending the statutory Adjustment Board decision of the merits of the underlying dispute. The essential question which this Court narrowly decided, in the affirmative, was whether or not the Court below,[8] in granting that injunction, could attach thereto certain prior "conditions requiring preservation of the *status quo" by the suitor.* This Court held no more than that, "under traditional equitable principles," the issuance of the injunction might so be qualified as "the price of relief".

We now complete this phase of the counter-argument as to whether or not a "labor injunction" is before this Court at all, separate from the normal equity power to

8. In passing, it is worthy of note in that case (at pp. 533-4) that the District Judge had been "scrupulous to avoid encroaching upon the jurisdiction of the Board" as to the merits of the basic dispute. This deserves contrast with the District Judge's remarkable encroachment on the arbitrator's peculiar function in our case, at R. 4, fol. 5: "* * * Sec. 20-c prohibits the disciplining of plaintiff's foreman. Certainly [sic] this must include the filing of charges against him." By the latter remark on an issue close to the heart of the case to be decided only by an arbitrator, the Court thus prejudicially all but made the "law of the case".

"stay", merely ancillary to jurisdiction otherwise attached to related or derivative subject-matter. We do not anticipate that this Court would attenuate the rationale of *Sinclair*, in the line of of decisions developing Sec. 301 law while continuing to enforce Norris-LaGuardia, so as to permit a restraint prohibiting disputed labor activities when verbally coupled as a "stay" with jurisdiction to enforce their arbitration, while holding such restraint impermissible as an "injunction" by direct suit therefor. Cf. this Court's unanimity in *Chauffeurs etc., Local 795* v. *Yellow Transit Freight Lines*, 370 U. S. 711. We find no intimations in that direction in *Missouri-Kansas-Texas*, supra, or in the Court's reservation therein in f. 3 (363 U. S. at 531). And we assume that *Sinclair* would not have been decided otherwise than it was if the injunction against the srike had been sought ancillary to an order to arbitrate underlying disputes or even the strike itself as an alleged breach of contract subject to arbitration.

To the extent that *Local Division 1098, Amalgamated etc.* v. *Eastern Greyhound Lines* (DC, DC decided December 18, 1963—Holtzoff, D.J.), 48 LC Par. 18,667, may suggest the other way in the sole light of *Lincoln Mills*, in our view it is thoroughly unsound. In that case a preliminary injunction (a "stay" in petitioner's concept) was sought *in haec verba* pending an arbitration already privately initiated and scheduled without Court compulsion. Yet it enjoined an employer's disputed plant-removal (lockout?) acts on the sole, strained theory that "the action * * * is a form of an attempt to enforce specific performance of an arbitration clause because what it seeks to do is to protect and safeguard the situation in such a manner that the award, when and if made, will be effective and not futile". Indeed, shortly before, with-

out the talismanic arbitration prop, the same Court had denied the preliminary injunction on ordinary "equitable principles".[9] *Idem*, 48 LC Par. 18,666.

ARGUMENT

I

The injunction, in a labor dispute, prohibited Kelly and Rowan, and each and every other member of respondent-union from "becoming or remaining a member" thereof, within the meaning, intent, and application of Norris-LaGuardia Sec. 4(b).

A. *Basic jurisdictional question still reserved*

With due deference to Judge Hays, who wrote for the Court of Appeals holding that the Union had "failed to establish" a Sec. 4 case, we deeply believe and still urge that the acts prohibited are characteristically, instinctively, and inextricably within the meaningful scope of that category. Without benefit of any analysis in that Court's opinion as to the shortcoming of that among our chief contentions, we respectfully and, of course, disappointedly disagree with the Court's summary rejection of that point, even though, as we shall argue below, it detoured to reach

9. Although we should have thought Norris-LaGuardia a decisive obstacle, the disposition of the first motion does not indicate that it was raised or considered. The later motion, however, brought the question up. Again on the singular authority of *Lincoln Mills*, misapplied as we think, the Court held Norris-LaGuardia inapplicable. Although we shall develop our reasons for so thinking in the points following, for present purposes at this juncture we would emphasize that in *Eastern Greyhound* actual jurisdiction under Sec. 301 was never invested in the Court purportedly to remedy a breach of contract to arbitrate, for there was no refusal on demand to do so. The unofficial report does not disclose the basis of jurisdiction for an injunction action beyond the implication of Sec. 301.

the correct result by the alternate route of Sec. 7. As noted above, the District Court had totally ignored all Norris-LaGuardia considerations without a word of comment. Hence the Court of Appeals' categorical treatment of the Sec. 4(b) issue is [redacted] illuminated from below as by way of an implied affirmance or adoption of any reasoning of record at the lower level. Accordingly, we shall argue here *de novo* the essentials of our Sec. 4 points as developed and briefed to the Courts below.

It should be observed at the outset that, unlike the employer in *Sinclair*, petitioner does *not* contend that Taft-Hartley Sec. 301, via *Lincoln Mills*, removed the bar to injunctions in arbitrable disputes involving Sec. 4 acts. Rather, it explicitly (Br. 13) "agrees that the Anti-Injunction Act should be rigorously applied to a true Section 4 situation", accepting the doctrine of *Sinclair* as well as the earlier application precisely to Sec. 4(b), outside the arbitration setting, in *Sperry Gyroscope Co. v. Hall*, 185 F. Supp. 64 (S.D. N. Y.). Petitioner contents itself and offers this Court for light, however, not a whit more than its own snap Q.E.D. that the acts enjoined "were clearly not Section 4 activities". (Br. 8.) It there seeks to rest on what the "court below * * * found", which was far short of that pellucid clarity in the court holding that the union had "failed to establish" the nexus to Sec. 4.

In our view, the naked question here is unencumbered by the accidental dress of Taft-Hartley Sec. 301 in which it is discovered. The bar of power to enjoin must be tested strictly by the independent scope and content of the anti-injunction statute itself. The bar is not lowered by the fact that the acts sought to be enjoined may have occurred in the setting of an existing collective bargaining agreement covering them, or in otherwise actionable

breach thereof, or in disregard of orderly processes for settlement under an arbitration commitment. *Sinclair, supra; A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 250 F. 2d 326 (C.A. 2), cert. denied 355 U. S. 932; *W. L. Mead, Inc.* v. *IBT*, 217 F. 2d 6 (C.A. 1). Removing, then, some of the earlier obfuscations of Taft-Hartley Sec. 301, we may approach the question of jurisdictional power in stark terms of whether or not the union's acts complained of could be enjoined *per se* at the instance of employer even if there were no collective agreement, and, of course, no breach thereof and no avoidance of an arbitration commitment.

Moreover, as we see it, the foremanship of union member Rowan is also accidental and indeed irrelevant to this precise question for the purposes of the case. Just as a specific commitment by the union not to discipline a foreman-member adds or subtracts nothing in terms of the Court's jurisdiction to enjoin the *act* of disciplining him, so it adds or subtracts nothing, as to jurisdiction to enjoin the discipline of Rowan *qua* union member, that he happens to be a foreman. Truly Sec. 20-c might as well have provided, for all it matters to this phase of the case, that the union would not discipline *any member*, not merely the foreman, for carrying out management's instructions. Similarly, it would not matter if there were no Sec. 20-c at all and the employer simply sought an injunction against union discipline of some foreman or other member because of some adverse effect which such union action would have, substantially and demonstrably if you will, upon the employer, as was held to be the arbitrable fact question in *Macneish*, where there was no specific equivalent to our contract's Sec. 20-c.

First, we should call attention that there is no issue in this case as to the existence of a requisite Sec. 13 "labor

dispute" in which the union is a "person participating or interested". The case comes here on that assumption from the pleadings and as held by the Court of Appeals, although without findings to that effect in the District Court except as implied in its taking jurisdiction under Taft-Hartley Sec. 301 to order arbitration.

B. *Sec. 4(b) not concerned with "yellow dog" contracts*

As one might expect, the pre-1932 occasions for the "abuse" of injunctions had arisen mainly in connection with strikes, boycotts, and picketing. However, for almost a century before enactment of Norris-LaGuardia, the common law had developed quite fully to the point of no longer regarding a union, without more, as a criminal conspiracy or otherwise unlawful combination *per se*, or the act of "becoming and remaining a member" thereof a wrongdoing. In 1932 there were *no* "modern" cases of injunction against union membership as such. However, "yellow dog" contract breach inducements, as torts, had brought a spate of injunctions in the preceding twenty years.[10]

We have found no legislative history, unfortunately, and no Court decisions other than *Sperry Gyroscope*, supra, in the thirty-two years since enactment, that would shed any light precisely as to what Congress may have had in mind to accomplish at the farthest reach of Sec. 4(b). We are told without qualification, "The kinds of acts which had given rise to abuse of the power to enjoin are listed in Sec. 4." (*Lincoln Mills*, p. 458.) Thus we are led to inquire, in the blurred history of contemporary problems, as to why particularly subsec. (b), both in substance and in the form of its phrasing, was deliberately written into

10. Notably, *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229.

Norris-LaGuardia Sec. 4, and as to what covered conduct may have been intended thus to be protected from injunction abuse.[11]

Pretty obviously, subsec. (b) was not put there *because of* "yellow dog" contracts. Nor was there any current or foreseeable problem of injunctions baldly forbidding union membership without more. The then unrestricted power of employers to fire must have been far more efficacious. Then prevalent injunctions against "stranger" enticement of employees to violate "yellow dog" contracts were palpably not met in any construction of the Sec. 4(b) language. Not even suggestively did it touch the acts of such "tortfeasors".

Besides, whatever problems inhered in and grew out of "yellow dog" contracts were quite effectively and even more thoroughly taken care of, specifically and exclusively, in Sec. 3 of the Act outlawing such contracts, denying them enforceability, and allowing them "no basis for the granting of legal or equitable relief". In *Sperry Gyroscope*, supra, District Judge Herlands, as far as he had to go, correctly observed: "There is no ground and no authority for limiting Section 104(b) to 'yellow dog' contracts * * *. By its terms, it embraces more than such contracts. Even Section 103, to which it refers, deals with other kinds of restrictive contracts."

C. *Sec. 4(b) concerns privilege of individual choice and internal group control of union membership*

In light of all these considerations, we approach Sec. 4(b) in its own terms. It peremptorily withdraws juris-

11. Of the nine listed "acts" in Sec. 4, this was the only brand new one of substance added to the former list contained since 1914 in Sec. 20 of the Clayton Act (38 Stat. 738; 29 USC 52) and carried over without substantial change, after disenchantment otherwise, into the superseding Norris-LaGuardia Act in 1932.

diction of the Court "to prohibit any person * * * from doing, whether singly or *in concert* (emphasis supplied) any of the following acts: * * * (b) Becoming or remaining a member of any labor organization * * *." At once we are impressed that such "act", when done by persons *in concert*, must sensibly contemplate more than individual conduct by personal choice of being a union man or not, and must be construed to reach group activities in self-association and self-organization, including the essential act of self-governance institutionally according to self-imposed rules and regulations of internal conduct as aspects of "remaining a member".

That there is such broader, more comprehensive meaning intended in the simple words of Sec. 4(b) may be sensed without strain in the consistent style of the fuller context of Sec. 4. For by like simple phrasings of primitive acts of basic conduct, earlier so written in Sec. 20 of the Clayton Act, the other eight subsections of Sec. 4 have been held to insulate the various other "acts" and their later developed variations and ramifications.[12] The statutory phrasings were surely not devised as a draftsman's literal precision or as tender euphemisms, but must rather be understood as artful cullings of neutral words of ultimate behavioral significance, with maximum practicable flexibility to reach all then present and future forms and manifestations of the activity so described.

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12. Cf. *Copra v. Suro*, 236 F. 2d 107 (C.A. 1), holding as to a stated Taft-Hartley Sec. 301 cause of action between employee-beneficiaries and trustees of a jointly administered welfare trust fund (surely unheard of in 1932), that Norris-LaGuardia Sec. 4(c) "expressly" forbids an injunction to freeze the power of the trustees to collect or disburse any moneys provided for under the trust agreement and declaration, originated in 1950.

D. *Sec. 4(b) draws meaning from Sec. 2 policy of freedom of association and self-organization*

This view and appraisal of the scope of meaning of Sec. 4(b) is both limited and enriched by the scope and content of the stated policies of the Act as a whole. Those public policies, set out in Sec. 2 of the Act, are indeed posited as the touchstone of "interpretation of this Act and in determining the jurisdiction and authority of the courts * * *." For the very first time in any statute,[13] Congress herein declared, among other things, that "under prevailing economic conditions * * * it is necessary that (the individual unorganized worker) have full freedom of association, self-organization * * *, and that he shall be free from interference, restraint, or coercion of employers * * * in self-organization or in other concerted activities for the purpose of * * * mutual aid or protection * * *."

It is our contention that the thrust and sweep of the Sec. 4(b) language, probed and understood in the full context of the statute even as enacted, and as the growth and democratization of unions have given that provision not an after-acquired but a reinforced meaningfulness, were fairly calculated to reach cases of the kind now at bar. It is intimately related to and an inseparable part of the "act" of any and all employees in independently and freely asserting and enjoying identifications in union not only without employer interference but, more im-

13. Perhaps more accurately, the Railway Labor Act, 44 Stat. 577, 45 U.S.C. 151, enacted in 1926, was a precursor, but it was specifically confined to "carrier" employees and, in setting up machinery for the settlement of disputes, was designed to avoid interruption to commerce or to the operation of carriers, rather than to restrict the jurisdiction of courts in the avowed interest of freeing workers from judicial interference. Cases under that Act bring no light, by reflection, on the Sec. 4(b) question we are dealing with.

portantly to the legislators, without further judicial interference. In that view, the District Court herein was utterly without power to issue its injunction prohibiting respondent-union from processing and investigating the Kelly charge against Rowan in vindication of their respective privileges and obligations of voluntary association and of the like incidents of all their fellow-members in self-organization.

Internal self-regulation, institutionally and *inter sese*, by the members of a labor organization and enforcement of the rights and obligations of individual membership therein clear of employer interference are essentials of "full freedom of association, self-organization", etc. bespoken as Congressional policy in Sec. 2, and are significant aspects of the act of "becoming or remaining a member of any labor organization", as protected under Sec. 4(b).

Sec. 4(b) is a simply worded but basic description of an immunized "act" comprehending the full variety of internal behavior by a union and its members in free association and self-regulation. It would frustrate legislative intent and fly in the face of this Court's construction to read the language too literally and shrivel its meaning to the bare incident of formally joining a union or the passive maintenance of good standing therein. Rather, the whole gamut of rights and duties of union members as between and among themselves and in relation to their union institutionally, as governed by the "contract" inherent in its constitution and bylaws (*Ass'n. of Machinists* v. *Gonzales*, 356 U. S. 617), is embraced in the full freedom of association, self-organization * * * free from the interference * * * of employers" spelled out in Sec. 2 of the Act and infused in Sec. 4(b) as the instinctive characteristics of "becoming or remaining a member

of any labor organization", free from restriction by injunction.

In *Sperry Gyroscope*, supra, the employer in a declaratory judgment suit sought to enjoin the union from breaching an express agreement not to affiliate organically with certain other types of labor organizations unless first approved by a majority of *all* employees, not only of its own members, in the present bargaining unit represented by the union. The union was about to affiliate with an international union but would not permit non-members who were in the unit to vote on authorization. District Judge Herlands held: "Such an injunction would restrain the union membership, collectively, from freely associating itself with the international." He concluded, in denying the motion for an injunction by reason of Sees. 2 and 4(b):

> "However reasonable (the agreement) appears to be, an injunction preventing its breach would be an order of a federal court impinging upon the full freedom of association * * * by employees. That is precisely what Congress intended to prevent by the broad provisions of the Norris-LaGuardia Act.
>
> "(The agreement) may be legal and plaintiff may be entitled to such other relief (under Section 301 * * *) as the Norris-LaGuardia Act does not withdraw from the jurisdiction of the court * * *."

The protection by Sec. 4(b) from private injunction against acts which lie in the domain of "internal union affairs" and which involve a union's own prescribed rules finds its counterpart and logical extension in the protection by proviso[14] in Sec. 8(b)(1)(A) of the Taft-Hartley Act

14. *UAW Local 283, Wisconsin Motor Corp. et al*, 145 NLRB No. 109, decided January 17, 1964, holding the quoted proviso to include disciplinary fines and suspensions on union members who violated a union rule imposing production earning ceilings on piecework ers. *American Newspaper Publishers' Association* v. *NLRB*, 193 F. 2d 782 (C.A. 7), 800, 806, affirming 86 NLRB 951, 955-7.

against Labor Board "injunctions" touching such rules respecting "the acquisition or retention of membership therein". These protections do not turn necessarily on any claim of tight insularity of such matters from some practical, possibly legitimate concern of employers in collective bargaining or other labor-management relationships. *Allen-Bradley Co.* v. *NLRB*, 286 F. 2d 442 (C.A. 7).

Nor does respondent union here question the validity and enforceability, otherwise than by injunction, of Sec. 20-c of its agreement with petitioner. However, to the extent that rights and duties of respondent, as a responsible union vis-à-vis its members Kelly and Rowan, and the latter's rights and duties as its members, may seem to have been limited or contracted away in any degree in Sec. 20-c, even their alleged wrongful exercise and pursuit are, at the very least, beyond reach of the injunctive process. For if *Allen-Bradley*, supra, is right that a proposal limiting the Union's right to discipline members is a mandatory subject for bargaining relative to terms and conditions of employment, then it must be equally true that an injunction against such discipline would not only intrude into the area of and affect such terms and conditions, but curtail the union freedom of unilateral action as well, subject only to contractual remedies. *Macneish*, supra.

The constrictions of Norris-LaGuardia in delimiting the "forbidden territory" for injunctions in this area are nowhere more forcefully illustrated than in *Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y.), aff'd 173 F. 2d 567 (C.A. 2), cert. denied 338 U. S. 821. In that case, employers sought to enjoin a union and some "rebellious members" who, in defiance of the union, would not honor its contract with plaintiffs. *The union indeed did not oppose the petition for an*

injunction, among other things within Sec. 4 "restraining the union from receiving the dues of the recalcitrant members and conferring upon them any union benefits". Nonetheless the Court reluctantly held itself powerless under the Act to enjoin. In passing, District Judge Rifkind noted that "it is not yet the policy of the United States judicially to compel obedience to collective bargaining agreements on pain of imprisonment"; moreover, "* * * the courts are not suitable instruments for maintaining internal discipline inside a workshop"—or, it might have added, inside a union.

No limitations or qualifications are placed upon the absolute command in Sec. 1 of the Act that, apart from procedural conformity in other proper cases, *no* injunction shall be issued "contrary to the public policy declared in" Sec. 2. That command controls even in a case of conduct seemingly devoid of any of the particular characteristics of the snugly literal specifications on the face of Sec. 4, but yet integrally, functionally, and realistically implied in the behavior so specified and so in consonance with the policy enunciated in Sec. 2. If such broader conduct is enjoined, the courts would by so much frustrate that command and emasculate that policy.

As hereinbefore shown, the restraint upon the union deters it from exercising its constitutional duty to its members to receive, entertain, investigate, and try cognizable charges lodged by any member against another and duly authorized by its membership to be processed. Not only is it the right and privilege of a member to initiate such proceedings, but it is a liability of every other member so to be charged and subjected to the process, as it is the union's inescapable duty to serve the members in the role of providing them with prescribed measures of due process and fair vindication. The comprehensive

system detailed in the organic laws of the union (R. 27-35) is an exemplar of classical democratic procedures under the "rule of law", outstanding among trade unions.[15]

It may be remarked that as a foreman's required union membership, permissible under Sec. 14(a) of Taft-Hartley, is not to be presumed a *per se* violation of law because he has the power and opportunity to discriminate (*Teamsters Local 357* v. *NLRB*, 365 U. S. 667; *NLRB* v. *News Syndicate Co., Inc.*, 365 U. S. 695), so too it is not to be presumed that, because it has the power duly to discipline its members, the union will ultimately violate Sec. 20-c of its contract with the employer in respect of Kelly's charge against Rowan.

But if we should suppose, contrary to long experience within this local union (R. 39-40), that due proceedings *might* eventuate in union discipline of foreman Rowan in violation of Sec. 20-c, a premature, jumpy fear as to that mere possibility is not a basis for injunction in any event. It cannot conceivably be that the contractual Sec. 4's flat and unqualified requirement of foreman Rowan's union membership was so faithlessly negotiated[16] or artlessly written as to be without substantial meaning.

15. It is one of the only two unions which provide a preliminary two-step review by the total membership body before one member's charges against another may be brought to trial. This union alone further provides an intermediate review and report between those steps by a special investigating committee. *Disciplinary Powers and Procedures in Union Constitutions*, p. 48, U. S. Department of Labor Bulletin No. 1350 (May 1963).

16. If the union gained something, by way of reassurances against certain employee insecurities, in this bargained requirement of the foreman's union membership, the employer gained much too in the confidence and respect of its employees for such supervision by one from their own ranks. We can hardly believe that the employer intended to overreach the union with no more than an illusory promise of the requirement in exchange for a measure of privileged surveillance of private union matters and privileged "company domination" of the union, otherwise denied to the employer as a matter of law in placing its foreman, as such, inside the union halls with no accountability but to the employer.

E. *Sec. 4(b), so construed, is fortified by Taft-Hartley and Landrum-Griffin*

Taft-Hartley guarantees to union members the unrestricted right of association (Sec. 7) free from any employer interference [Sec. 8(a)(1)], and to the union freedom from such interference with its own administration [Sec. 8(a)(2)], including its own prescribed rules with respect to the retention of membership [Sec. 8(b)(1)(A) proviso]; and permits a foreman to become and remain a union member [Sec. 14(a)].

Landrum-Griffin (Title I, Bill of Rights) guarantees to union members equal rights and subjects them to equal liabilities in the affairs and procedures of the union, including rules as to their several responsibilities to it as such [Sec. 101(a)(2)] with safeguards against disciplinary action but by due process [Sec. 101(a)(5)], yet under requirement of exhaustion of reasonable internal remedies before resort to courts [Sec. 102], where only as a party in a member's own proper action may an employer "participate" [Sec. 101(a)(4)].

Even if we assume, *arguendo*, that the union's mere investigation of the Kelly charge is, without more, forbidden "discipline" of foreman Rowan or that it will surely eventuate in a penalty upon the latter contrary to Sec. 20-a yet such wrongful acts are not a proper subject allowed to the Court for judicial pre-testing as to the possible merits of the controversy for a precautionary injunction. It is time enough after, indeed premature until,[17] an arbitration award so finally holds and court

17. That even an arbitrator invested with ceded power to enjoin will rather exercise judicious self-restraint than so act upon an employer's contractual grievance *anticipatory* of forbidden union discipline which may be visited upon its members in future, hence "too nebulous and too speculative" for such injunctive prohibition, see *New York Twist Drill Mfg. Co.*, 39 LA 167, 168.

confirmation is obtained. Only then, if ever, may the acts be restrained or otherwise remedied by fashioned decree commanding obedience to the award.

The conduct here enjoined is completely fortified by strong considerations of expressed and positive public policy cited above from Taft-Hartley and Landrum-Griffin, and in no way conflicts with any other public policy. Injunction would be contrary to the overriding policy of employees' free association in unions of their choice with equal rights under fair and democratic procedures. The improvident effect of the instant intrusive injunction would be to cause the union to suspend the operation of its vital internal rules and regulations. This would deny their lawful protection and benefit to its members, and discriminatorily withhold the processes allowing and requiring willing members to resort to their prescribed rights and to discharge their voluntarily undertaken responsibilities toward the organization and their fellow-members similarly bound, similarly safeguarded.

Worse, the injunction, by trenching upon the union's internal affairs, indirectly becomes in effect a specific instrument for the employer's indulgence in unfair labor practices under Taft-Hartley by interference[18] with its employees and with their union administration, and for the employer's impairment of its employees' "equal rights" as union members under Landrum-Griffin. Rather, under this last Act, only in protection and vindication of such rights, and not to stifle them, is judicial intervention by injunction allowed and invited (Sec. 102), and then only at the instance of a union member [Sec. 101 (a)(4), 102]. Nowhere does the legislative history of Taft-Hartley or of Landrum-Griffin indicate a Congressional concern and

18. *NLRB* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), enforcing 88 NLRB 75, 76; *Fairfield Engineering Co.*, 74 NLRB 827.

purpose to invest employers with an effective interest superior to that of employees in union democracy, members' "bill of rights", free association, and self-organization.

Surely a charged member of the union such as foreman Rowan could not avail himself, even under the explicit guarantees and remedies of Landrum-Griffin Secs. 101 and 102, to obtain an injunction against the union's mere processing of the charge against him. Apart from the necessity of recourse first to and exhaustion of the reasonable inquiry, hearing, and decisional procedures within the union before he might be disciplined actionably at all, even the burden of his ultimate discipline might have to abide exhaustion of his further "home" remedies of appeal and review before the courts will intervene. *Edsberg* v. *Local Union No. 12*, 300 F. 2d 785 (C.A. 9); *Delahery* v. *Marine Cooks & Stewards*, 199 F. Supp. 270 (D.C. Cal.); cf. *Detroy* v. *American Guild of Variety Artists*, 286 F. 2d 75 (C.A. 2), cert. denied 366 U. S. 929. In *Edsberg* the Court said, "We find here no uncertain or futile remedy offered to appellants (union members) by their own organization. In the absence of such a factual situation, we recognize and reaffirm 'the declared policy [of the courts] favoring self-regulation by unions.' *Detroy* v. *American Guild of Variety Artists*, *supra*, at 81." Also see *Flaherty* v. *United Steelworkers* (U.S.D.C., So. Dist. Cal.) 46 LRRM 3006, 41 LC Par. 16,517, unreported officially.

Hence, since a union member himself does not have a cause of action, and there is no subject-matter for Court jurisdiction to grant injunctive relief in his favor, until a defined measure of actual discipline has been imposed on him and fair, reasonable, internal procedures have been

duly exhausted before and after that event, perforce the employer independently contracting with the union likewise against such discipline cannot be conceived sooner to acquire a parallel cause of action for such preferred relief, or the Court any jurisdiction to grant the same, than it can have accrued to the member.

Finally, if we may be allowed the rhetoric, can it be that under Sec. 4(a) the Court would be powerless (*Sinclair*) to enjoin the union from a concerted refusal to work with or in protest against some actions of foreman Rowan so long as he remained a member of the union; but that despite Sec. 4(b) the Court could enjoin its sober introspective inquiry as to whether, having "become", he should "remain" one of its members, and if so under what terms of condign discipline for his protested actions?

At the risk of having argued our Sec. 4(b) point at too great length, at apparent cross-purposes with petitioner's main point, and wide of the exact issue on which certiorari was sought and granted, we fully developed this phase of our argument as we presumed to reserve it for fundamental review, and now pass to the Sec. 7 question which, respectfully, we consider to be secondary and subordinate.

II

The injunction was subject to the jurisdictional limitations and procedural requirements of Norris-LaGuardia Section 7.

We come now to consider whether, if indeed at all "the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in Sec. 301 to sue for breach of a collective agreement" (*Sinclair*, at p. 214), he may have it in disregard of

Norris-LaGuardia Sec. 7. The Court of Appeals has said no; the District Court, to repeat, had said nothing. Petitioner says yes because Norris-LaGuardia altogether, and Sec. 7 thereof at least, are as "inapposite" as the latter was held to be in *Lincoln Mills* when only compelling arbitration.

This Court duly noted the sure practicality "that the right to sue which Sec. 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements" (*Sinclair*, p. 214). Nonetheless, it also observed there that, even without the aid of such unavailable injunction, the contractual right to arbitration is still quite unimpaired in its appropriate enforceability. Chief Judge Magruder had earlier remarked in *Local 205, U. E. v. General Electric Co.*, 233 F. 2d 85 (C.A. 1), "Continuation of the strike theoretically is not a barrier to an arbitration • • •. But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy."

A. *Sec. 7 "inapposite" only when Norris-LaGuardia, in rare exceptions, entirely inapplicable*

While *Lincoln Mills* declared Sec. 7 "inapposite" and *General Electric, supra*, referred to it in a negative context as possibly a "snare and delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts", both those cases were dealing narrowly with reasons for not inhibiting a Taft-Hartley Sec. 301 action for only a mandatory decree of specific performance of an agreement to arbitrate. Neither addressed itself to a prohibitory injunction's requirements under Sec. 7 where the acts fit specifically into the Sec. 4 or other kinds of positive conduct not to be enjoined, by fiat of Sec. 1, because they are privileged

behavior contemplated in and consistent with Sec. 2's interpretative policy statement.

Enforcement of arbitration agreements is at once, of course, a complete effectuation of Taft-Hartley Sec. 301 as an avowed extension of responsible collective bargaining; but, as to Norris-LaGuardia, it negates *no* element of the guiding "full freedom" declarations in Sec. 2, and besides is not a prohibition of any of the particularized Sec. 4 "acts" or other labor conduct protected against injunctions. In effect, though short of outright expression, this Court and others in the line of its authority seem to have said that Sec. 7 is "inapposite" to arbitration orders because, really *in its entirety*, Norris-LaGuardia has no meaningful application at all to a non-prohibitory injunction directing the doing of the defined act of arbitration. The very consummation of that act, pursuant to voluntary agreement, is itself a positive affirmation of the desired good in the public policy set out in Sec. 2. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 563.

By contrast, prohibitory injunctions reaching acts such as fall specially within Sec. 4, or which more generally constitute inherently a course of conduct otherwise characteristic of or germane to the exercises of "full freedom" in the Sec. 2 postulate, are blanketed inevitably under Norris-LaGuardia limitations at large. Hence they are appositely, indeed inextricably, subject to the jurisdictional prerequisites of Sec. 7, if somehow the several absolute withdrawals of injunctive power, by virtue of Secs. 1 and 4, are to be lifted in the abnormal cases therein provided for. The very few exceptions in this Court to that general proposition have been narrowly drawn, if not always with easy reconciliation, around compelling reasons such as clear primacy of some other statutory objective, as in the railway cases, or of the

duty of fair representation, or such as abhorrence of racial discrimination in labor relations.

These rare exceptions have been made with due re-emphasis in each instance[19] that Norris-LaGuardia as a vehicle of living public policy nonetheless survives strong. In none of those exceptional cases, moreover, has the Court *separately* lifted only the specific requirements of conformity with Sec. 7. Those demands have been dispensed with radically only as Norris-LaGuardia *as a whole* was held not to be a bar at all. In the generality of cases to which that Act has been left applicable, "the 'injunction' at which Sec. 7 was aimed", as Chief Judge Magruder put it in *General Electric*, "is the traditional 'labor injunction', typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute."

B. *Sec. 7 otherwise inevitable in prohibitory injunctions against Sec. 2 or Sec. 4 conduct*

We shall analyze Norris-LaGuardia Sec. 7 in terms of the type of labor dispute "case" to which its procedures are stated to be applicable. We lay aside breaches of agreement merely to arbitrate, in which inapplicability has already been decided. The introductory paragraph of Sec. 7 denies jurisdiction to enjoin "in any case * * * except" on the conditions mentioned. This Court in its various recent opinions dealing with refusals to arbitrate and with strikes in breach of contract or in violation of other laws is at times thought to have suggested, and some lower courts seem so to have understood, that Sec. 4 provides a specification of the *entire* all-inclusive panoply

19. *Order of Railroad Teleg.* v. *Chicago & NWR Co.*, 362 U. S. 330, 338-9, for discussion of and citations (ff. 14, 15) to these exceptions.

of activities as to which injunction abuses had occurred prior to 1932 and, in constant sum and distinctive variety, were to be prevented in future. By the same token, that unwitting suggestion has been thought to go further: that due injunction under Sec. 7 may be had against not only certain unlawful, violent, or fraudulent deviants of those precise Sec. 4 "acts", but against any and all *other* labor dispute conduct, even though not so tainted and clearly within the range of "full freedom" of actions under Sec. 2 broad policy.

We do not read these cases to hold, even to suggest but when torn out of context, any such sweeping proposition as to such other acts not exactly slotted into or apparently unrelated to Sec. 4. For we are confident that the Court never meant to ignore or nullify the last clause in Sec. 1: "nor shall any such * * * injunction be issued contrary to the public policy declared in this Act," immediately following in Sec. 2. That quoted clause clearly comprehended not only specific "acts" described in Sec. 4 which, of course, were more generally covered as well by Sec. 1, but any and all other kinds of conduct unmentioned in Sec. 4 yet described as within the "necessary * * * freedom" of actions in Sec. 2. That policy statement, be it remembered, was written not only as a charter of substantive rights or privileges but, on its face, as the express, binding standard of "interpretation of this Act and in determining the jurisdiction and authority of the courts * * *."

That is to say, for a single example, that the employee act of "*designation* of representatives of his own choosing" (Sec. 2), even *without* "becoming or remaining a member of any labor organization" (Sec. 4), cannot be enjoined without running "contrary to the public policy declared in this Act" (Sec. 1), and is therefore immune to any such

restraint. If somehow that or some other such illustrative act, only to be identified with Sec. 2, were tainted with violence or fraud or other such illegality, then as with Sec. 4 acts so tainted, it would be enjoinable subject nevertheless to Sec. 7. That, we maintain, is the natural, intended, and inescapable scope and meaning of the last clause of Sec. 1 and of "any case" in Sec. 7. *Milk Wagon Drivers etc.* v. *Lake Valley Farm Products etc.*, 311 U. S. 91, 101.

It is true that in *Lincoln Mills* (at p. 458) this Court had said and has since repeated, in differentiating a mandatory injunction to arbitrate from other traditional labor injunctions, that the Sec. 4 listings were the "kinds of acts *which had given rise* to abuse of the power to enjoin" (emphasis supplied). That observation was undoubtedly valid history. But in *Sinclair* (at p. 212), inadvertently we are sure, this Court may have seemed to enlarge upon that observation by a loose paraphrase: "kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of the United States courts", citing (f. 33 thereto) to *Lincoln Mills* "and other cases not involving an injunction against activity protected by Sec. 4 * * *." The restricted reference to Sec. 4 cases of curtailed injunctive power might seem to suggest more than the historical fact that, in genesis, they "had given rise" to abuse of power; and rather that they were indeed exclusively the full range and sum total of acts now protected by the Act at large, in face of the array of Secs. 1, 2 and 3 along with Sec. 4.

But surely the Court could have meant no such relaxation of the Act's aversion to labor injunctions in general, for even in *Lincoln Mills*, immediately after the historical recitation as to how judicial abuses had arisen in such matters as listed in Sec. 4, the Court in the very next

sentence (p. 458) went on to add: "The failure to arbitrate was not a part and parcel of the abuses against which *the Act* was aimed" (emphasis supplied). And indeed in *Sinclair* too, at p. 203, in referring to the repealer argument, this Court stated the contention to be that the Act "no longer prohibits *even the injunctions specifically described in Sec. 4* * * *." This clearly implies that the Act also and more broadly prohibited some other injunctions as well. The test, then, which this Court would set is obviously whether the "acts" sought to be enjoined are protected, not by Sec. 4 alone, but by *any* command of the Act as a whole.

Upon this view of the law, we consider unsound the relevant Norris-LaGuardia analysis and ruling in *Parks* v. *IBEW*, 314 F. 2d 886 (C.A. 4), cert. denied 372 U. S. 976, cited and discussed in petitioner's Brief, p. 11, to the extent that, rather tentatively at least because a mandatory rather than a prohibitory injunction was involved, it concluded more importantly, on the misread or misconstrued authority of *Lincoln Mills*, that unless a Sec. 4 type of "abuse" was present in the case the Act did not operate to limit injunctive power at all.

C. *Sec. 7 correctly applied by Court of Appeals to bar injunction against Sec. 2 conduct*

To the contrary and insofar as there is an arguable conflict, although Judge Hays did not spell out the details in his opinion for the Court below, we submit that the Court of Appeals decision in our case now under review represents the sounder authority. Judge Hays, without express reference to the enjoined conduct's place under Secs. 1 and 2, wrote that, in the generality of labor disputes, "Section 7 of the Act covers activities which are not covered by Section 4 * * * without regard to the nature of

the activities * * *" (R. 52-3). Impliedly, of course, he nevertheless must have meant activities generically fitting within the Sec. 2 charter of "full freedom" of actions.

It was held in *Green* v. *Obergfell*, 121 F. 2d 46 (CA DC), cert. denied 314 U. S. 637, that self-determination of internally disputed union affairs, solely concerning "jurisdiction" as among the litigating labor organizations, was an exercise of the "full freedom of association, self-organization and designation of representatives". As such, that activity was held, on extended analysis of "recognized principles" and the facts of the case, to afford "no foundation for equitable relief, or reason for judicial interference" in the "intra-association affairs" of the parties. More pointedly here, it held that this conduct was immune to prohibitory injunction, by force of Norris-LaGuardia Sec. 1 and without reference to Sec. 4 at all: hence that, if enmeshed with such unlawful acts as might restore to the Court the jurisdiction otherwise withdrawn, yet strict conformity with every last requirement of Sec. 7 was an express, inescapable, non-waivable condition precedent to the power to enjoin.

Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323, was this Court's early leading case on the absolute necessity of exact compliance with each and every requirement under Sec. 7 as to procedures and complete findings concerning the nature of the case and the unlawful acts, specified equitable grounds for relief, and the complainant's helplessness to secure legal protection of physical property. No combination of these elements short of their totality was suggested as substantial or adequate compliance to satisfy the flat statutory conditions of jurisdiction. That the case, on its peculiar facts, may have involved an act specified in Sec. 4 of Norris-LaGuardia is beside the point. The lesson is rather that no prohibitory injunction what-

ever may be issued in a labor dispute to restrain acts unless the case is of a kind wherein each of the stated factual and equitable conditions is fully present and satisfactorily met in advance. This was unqualifiedly reaffirmed by the Court in *Sinclair* at p. 202, by citation in f. 13. *Wilson & Co.* v. *Birl*, 105 F. 2d 948 (C.A. 3).

Furthermore, in *Grace Co.* v. *Williams*, 96 F. 2d 478 (C.A. 8), it was even more severely held, on authority of *Lauf* and on the explicit wording of Sec. 7, that where the complaint itself failed affirmatively to allege under oath the exactly fitting fact situation and precise compliance with and satisfaction of each and every one of the conditions, such fatal defect could not be cured even by findings of fact supported by evidence meeting the essentials not so pleaded. Our instant case is more incurably lacking for neither the allegations of the complaint, nor evidence, nor findings are present which purport to satisfy the test.

What is more, as Judge Hays observed below, not only were the Sec. 7 requirements not met, "but it would clearly be impossible for the court to make the required findings". The impossibility so referred to must have been in terms of "threatened unlawful acts", under subsection (a) thereof, and of "police protection of property", under subsection (e). As for subsections (b), (c), and (d) of Sec. 7, all that need be remarked is that the record was barren of any evidence of the slightest value, even by affidavit, on which to bottom any such conventional findings in equity.

D. *Sec. 7 so applied not inconsistent with ordered arbitration*

Of course, by requiring Sec. 7 to be met "in *any* case" and thereby perhaps, as held in our instant case, precluding injunctive relief, the Court doubtless renders the suitor therefor as unrequited and unhappy as though

his complaint were held to fall hopelessly under Sec. 4 itself. Besides, the one reason rather than the other for denying that relief, especially when sought to be coupled with an arbitration order, has no different redemption value in the limited expectancies of the scheme of arbitration at its *optimum* achievement in substituting for and thus avoiding trial by combat.

But that optimum is no more indispensable as an element or a measure of the success of arbitration than it is *sine qua non* of the success of collective bargaining itself. At best, those processes and their encouragement and enforcement are conceived to create an atmosphere conducive to, and thereby to *tend* in the direction of, peaceful solution of disputes free of direct action sometimes involving untoward brute pressures, and thus hopefully to minimize their frequency, duration, and intensity of impact. Those striving processes are not realistically in experience, or by design and express provision of the relevant statutes, so exclusive, compulsory, and repressive as to foreclose, as between the private parties, any occasional parallel resort to the direct pressures and actions customary to industrial disputes and otherwise quite lawful in nature. *The Public Interest in National Labor Policy* (C.E.D. 1961), page 90.

As Taft-Hartley undertakes no more than to bring the parties to the conference room door and to see them enter to bargain per NLRB sanction or to arbitrate per the Court's, so it leaves them normally to their own private devices within civilized limits, at least as between themselves, as to how they shall behave inside and outside that room in affecting or accomplishing their ultimately acceptable solutions. As "there is simply no inconsistency between the application of economic pressure and good-faith bargaining" (*NLRB* v. *Insurance Agents' Inter-*

national Union, 361 U. S. 477, 494-5), so there is none between such pressure and good-faith arbitration.

So too, as petitioner fears, a Court's failure or lack of power to enjoin certain labor activities may adventitiously at times somehow embarass or even in some measure frustrate full attainment of one or more of all ultimate objects variously desired to be had by way of arbitration. But that is equally true and no more or less significant, in law or in aspiration, for the prospectus of basic collective bargaining and even of faithful contract performance. As to those normal stabilizers in the conduct of labor relations, we have now come to accept the established fact that, in the main, concomitant pressures and breaches, however unstabilizing, are nonetheless non-enjoinable in private litigation in the federal courts.

In any of these respective situations the sense of that embarrassment and frustration is not always or wholly without its own possible constructiveness, even if only by indirection, in the aching business of labor relations. Sometimes, though of small comfort to one of the disputants, that sense may serve usefully at least as valid reason for mutual expedition of the otherwise dragging process of argumentative and deliberative settlement of differences, not a small achievement in itself. In all events, to make no more of such an *apologia*, it is a far cry from petitioner's notion that the process (here left dormant by petitioner itself) is thereby rendered utterly meaningless and ineffectual for its proper purposes, as though the whole structure of labor law and order had collapsed because Courts, by choice of Congress, are deprived of power to fashion and control every last form of behavior possibly touching such processes.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the order of the District Court staying and prohibiting respondent-union's internal activities upon the Kelly-Rowan charge, should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX:

Statutory Provisions Cited in Respondent's Brief

NORRIS-LAGUARDIA ANTI-INJUNCTION ACT

(47 Stat. 70, 29 USC 101)

"*Section 1.* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to

negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Section 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral; express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or re-

mains a member of any labor organization or of any employer organization.

Section 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

• • • • •

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

• • • • •

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

• • • • •

Section 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public

officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property • • •

• • • • •

Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

• • • • •

Section 13. When used in this act and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; • • • (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter

defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

("Taft-Hartley"—61 Stat. 136, 29 USC 141)

• • • • •

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to * * * interfere with the * * * administration of any labor organization * * *

* * * * *

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * * * *

Section 14(a). Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 ("Landrum-Griffin"—73 Stat. 522, 29 USC 411)

Section 101(a)(1). Equal Rights. Every member of a labor organization shall have equal rights and privileges within such organization * * * to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Section 101(a)(2). Freedom of Speech and Assembly. Every member of any labor organization shall have the

right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, * * * or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

Section 101(a)(4). Protection of the Right to Sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, * * *: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Section 101(a)(5). Safeguards Against Improper Disciplinary Action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reason-

able time to prepare his defense; (C) afforded a full and fair hearing.

Section 101(b). Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

UNITED STATES ARBITRATION ACT

(61 Stat. 669, 9 USC 1)

* * * * * *

Section 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.